No. 76-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS L. HOUCHINS,

Petitioner,

v.

KQED, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND, AMERICAN SOCIETY OF NEWSPAPER EDITORS AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

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October 1977

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The Reporters Committee for Freedom of the Press Legal Defense and Research Fund, the American Society of Newspaper Editors and the Radio-Television News Directors Association ask leave to file the accompanying brief amici curiae. Respondents have consented to such filing. Petitioner has withheld his consent.

The very names of the movant organizations indicate the nature of their interest in this case, which raises an important question of access to news.

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund is made up of working news reporters and editors actively engaged in the business of gathering news for newspapers, magazines, television and radio. The Committee attempts by participation in litigation to advance the principle, embodied in the First Amendment, that government shall not impair the people's right to know by abridging the freedom of the press.

The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession."

The Radio-Television News Directors Association is a professional society of heads of broadcast news departments. It works for improving standards of broadcast journalism, and it defends the right of newsmen to access to news.

The movants believe that the restrictions imposed by the petitioner, Sheriff Houchins, on press access to the Alameda County jail facilities at Santa Rita pose a threat to the public's right to know about the workings of an important part of its government. They believe that they can illuminate the broad question of the constitutional validity of those restrictions as a result of the experience of their members in the gathering and publication and broadcast of news. They believe that such illumination will be useful to the Court, which should not be confined

in a case of this moment to the presentations of the immediate parties, able as these may be.

Respectfully submitted,

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QUESTION PRESENTED

The question presented is the constitutional validity of restrictions imposed by the petitioner, Sheriff Houchins, upon press access to the Alameda County jail facilities at Santa Rita. The result of the restrictions is to limit the facts available to the public about a public institution of the utmost social importance, an institution in which numerous individuals are held in confinement by public officials charged with responsibility for their custody and where substantial public funds are spent.

ARGUMENT

Three years ago this Court held that representatives of the news media were not constitutionally entitled to interview particular prison inmates of their designation. *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). In doing so, the Court nevertheless reaffirmed that "[n]ews gathering is not without its First Amendment protections." *Pell v. Procunier, supra* at 833, quoting *Branzburg v. Hayes,* 408 U.S. 665, 707 (1972). But it also said that "[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." 417 U.S. at 834, 850.

This case puts to the test whether the Court meant by that second comment to swallow up the first, to allow in practice the evisceration of freedom of press that it has said would result if there were not "some protection for seeking out the news." 408 U.S. at 681; 417 U.S. at 833. The petitioner Sheriff believes that the Court meant just that. He says that, because he allows the general public no access at all to the Alameda County jail (as he did before this suit was brought) or limits access to periodic conducted tours (as he now does), he can either bar reporters altogether or remit them to signing up for the conducted tours. If the Sheriff is right – if that is what the Court meant when it said that newsmen have no constitutional right of access beyond that afforded the general public – then it is hard to know what First Amendment protections against official barriers to the gathering

of news there are. The antiseptic, periodic public tour has almost nothing to do with news gathering. The Santa Rita tour does not allow photographers or television cameramen to record their impressions for the public.[1] For reporters who convey their impressions in words, the tour is irrelevant to the coverage of spot news stories involving jails and their inmates, which was the genesis of this lawsuit; it has very little more to do with serious journalistic inquiry into the physical and moral conditions of jails. The tours do not extend to all parts of the jail and reporters are not permitted to engage in any conversation with the prisoners.

The four judges who have heard this case on the merits are agreed that to sustain the Sheriff's position would disserve the public dependent on the press to the point of a constitutional violation, by depriving it of news about the Santa Rita jail. They therefore ruled that, subject to the Sheriff's power to exclude reporters when their presence would be dangerous, the Sheriff should be ordered to allow press access to the jail "at all reasonable times and hours" for the purpose of covering jail news. This Court should affirm their judgment.

I. PRISONS AND JAILS ARE MAJOR PUBLIC INSTITUTIONS IN WHICH CITIZENS HAVE A LEGITIMATE INTEREST

In the 1974 prison interview cases this Court declared that "the conditions in this Nation's prisons are a matter

[1] This discriminatory aspect of the tour policy without more condemns it as a denial to the electronic media of the equal protection of the laws. (Pp. 16-18, *infra.*)

that is both newsworthy and of great public importance." *Pell v. Procunier,* 417 U.S. 817, 830 n.7 (1974). It noted an observation of the Chief Justice.

> "We cannot 'continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence . . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem.'" *Id., quoting* Burger, *Our Options Are Limited,* 18 Vill. L. Rev. 165, 167 (1972).

The Court considers here not a prison but a county jail, one among 4,000 jails housing 150,000 persons convicted of minor offenses or awaiting trial.[2] This particular jail, Santa Rita Jail, contains one section called Greystone where conditions quite recently were termed by a district court "truly deplorable" and "shocking and debasing" and were held by the court to constitute cruel and unusual punishment. *Brenneman v. Madigan,* 343 F. Supp. 128, 133 (N.D. Cal. 1972). Significantly, the judge in that case found it necessary in making his judgment to visit Santa Rita because "the content of . . . the reality of confinement is so elusive . . . ." *Id.* at 132. Public understanding of what goes on, of "the reality of confinement," in the Alameda County jail and other local jails is obviously of as great importance as public understanding of what happens in state and federal prisons.

[2] Census Bureau, *Statistical Abstract of the United States, 1976,* pp. 171, 174.

II. THE PRESS PLAYS AN IMPORTANT, CONSTITUTIONALLY ASSIGNED ROLE IN FURTHERING PUBLIC KNOWLEDGE AND UNDERSTANDING OF PRISONS AND JAILS

It is the nature of prisons and jails that there are restrictions on who can enter, inspect or visit. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). In such circumstances the role of the press as the proxy of the public is of the greatest significance.

The press' ability to play this role is what leads to the conferral on it of what Mr. Justice Stewart has pointed out is unique, constitutional protection as an institution. Stewart, *"Or of the Press"*, 26 Hastings L.J. 631 (1975). "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The constitutional guarantees of freedom of the press "are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

Those are the lofty words of this Court explaining why the press' role in our society entitles it to unique constitutional protection. In the immediate context of the problem of this case, substantially the same point has been

made in practical terms by an experienced prison administrator, Mr. James W. L. Park. After criticizing a provision of a proposed Model Act for the Protection of Prisoners that, in his words, "opens the prison doors to anyone who happens to wander by and demand entrance," Mr. Park says:

> "A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, *On Being Medium Nice to Prisoners*, 1973 Wash. U.L.Q. 607, 615.

Within constraints, only some of which are a necessary function of the nature of prisons, newspapers, radio and television stations and periodicals seek to fulfill their constitutional function by keeping the public informed of happenings in prisons and jails. They do so at a time when the most fundamental questions are being raised about our correctional and detention institutions.[3] Perhaps the best examples of coverage of the long-term news about prisons are the quarterly issues of *Corrections Magazine*, published by the Correctional Information Service, Inc.,

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[3] See Serrill, *Critics of Corrections Speak Out*, Corrections Magazine, March 1976, p. 3.

which is affiliated with the American Bar Association's Commission on Correctional Facilities and Services. In its issues of March 1976 and March 1977 the magazine has reported record prison populations (as of January 1, 1976 and 1977, respectively) and has documented the resulting overcrowding by on-the-spot verbal and picture reporting.[4] The general-interest press has also published and broadcast in recent numerous accounts of jail and prison happenings and life.

Press coverage of correctional and detention institutions, though still sadly wanting, has improved to the extent that it has in large part because more prison and jail administrators share Mr. Park's philosophy than Sheriff Houchins'. The Santa Rita situation is aberrational. Other jails in California and elsewhere in the nation are far more open to the press. The sheriffs of the counties that neighbor Alameda County display no such reluctance as Sheriff Houchins to respond warmly to the California Department of Corrections guidelines for local detention facilities, which say that "the various news media should be provided with accurate and timely information so that the public can be adequately informed at all times." (Resp. Br. 12; A. 9-10, 14-15.)

The California and federal prison systems have policies of openness to the press. (Pet. App. 4-20.) The National Advisory Commission on Criminal Justice Standards and Goals, appointed by the Law Enforcement Assistance Administration, from which Alameda County has received

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[4] Gettinger, *U.S. Prison Population Hits All-Time High*, Corrections Magazine, March 1976, p. 9; Wilson, *U.S. Prison Population Sets Another Record, id.*, March 1977, p. 3.

a grant for the reconstruction of its jail, states as one of its standards that "[r]epresentatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy." (Resp. Br. 14.)

The point here is not that Sheriff Houchins' conduct is illegal because it does not conform with federal and state guidelines – though it does not – or that he may not deny to the citizens of Alameda the fruits of press access to the county jail that the citizens of other California counties enjoy – though the case to be made for the proposition that the Alameda County citizens are denied the equal protection of the laws is a substantial one.[5]

The point is that the pervasiveness of policies contrary to those of Sheriff Houchins and the absence of the slightest suggestion that these contrary policies have had untoward consequences place on the Sheriff a particularly heavy burden of justifying his restrictive policies. He has not carried that burden. He has offered scant justification other than his reading of this Court's 1974 prison interview cases. As we shall next show, that is not enough.

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[5] The mere existence of a county line cannot justify denying to those Californians who live and vote in Alameda County important political rights that other California citizens enjoy. Reynolds v. Sims, 377 U.S. 533 (1964). The right to be informed about local public affairs – such as jail conditions – is an important political right, a right indeed that alone makes possible the intelligent exercise of the right to vote involved in *Reynolds v. Sims*.

III. "REASONABLE ACCESS" FOR THE PRESS TO A COUNTY JAIL IS A MINIMAL FIRST AMENDMENT REQUIREMENT, AND AN ORDER SECURING IT IS CONSISTENT WITH *PELL* AND *SAXBE*

The right of access of the press, although related to the general public's right to information, ought not to be literally limited to the general public's right of physical access to a public facility. As a practical matter not all members of the public can have access to a jail. But the public is entitled to be informed of, for example, a jail suicide and the conditions that gave rise to it. It is for this reason that reporters are constitutionally entitled to access to the jail to report on the particular incident and its background. We submit that *Pell* and *Saxbe* are not to the contrary.

In *Pell,* the Court opened its discussion of the press' constitutional claims with the remark that the California prison regulation in issue, dealing with interviews with designated inmates, was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigating and reporting of those conditions." 417 U.S. at 830. And it noted in both *Pell* and *Saxbe* that, as was said in *Pell,* "both the press and the general public are accorded full opportunities to observe prison conditions." 417 U.S. at 830, 846-48. Without pausing to inquire whether Sheriff Houchins is attempting to conceal conditions or frustrate the press, the factual context of this case is altogether different. Before this suit was filed, the Santa Rita Jail was completely closed to the press and public. Attempts by reporters to cover stories at Santa Rita were rebuffed both by the previous sheriff and by Sheriff Houchins. These restrictions were imposed although the Sheriff was unaware of any disturbances ever caused by news media access to a jail and

had never even heard of any disruption in any jail or prison, anywhere, because of such access.

Only after this suit was filed did the Sheriff initiate a series of conducted tours for the public. The tours, as we have said, are no substitute for the opportunity to report first-hand on jail events and conditions – and certainly not for those who report by pictures instead of words – and in any event a reporter who did not sign up for a tour weeks or months in advance was completely barred from access to Santa Rita for the balance of 1975, the year in which the tours were first held. In striking contrast is the situation in the California prisons that the Court described in *Pell:*

> "[T]he record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions . . . . [N]ewsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants." 417 U.S. at 830.

The media plaintiffs in *Pell* and *Saxbe* asked for more. They wanted to be able to interview inmates of their designation. The Court sustained prison rules prohibiting this practice, finding that the prison administrators were justified in their apprehension that the elevation of inmates chosen as the interviewees to the status of "big wheels" would pose a security problem.

In this case, the plaintiff KQED asks only for such access as will enable it minimally to do its job of reporting on jail incidents and conditions. It seeks the ability to gather and convey information to which the public is entitled but that cannot be acquired by members of the public on their own because of the practicalities of jail administration and the limits of and demands upon even the most interested citizen's time. Unless KQED and its sister radio and television stations and newspapers and magazines have that access, then the government represented by Sheriff Houchins will be able to conceal conditions in the jail and "frustrate the press' investigation and reporting of those conditions . . . ." And the ultimate losers will be not only the inmates whose story will remain untold, but also the press and the public.

If the government were made to provide time and a place for an interview with a particular inmate, as it was asked to do in *Pell* and *Saxbe*, the government would be making specific information available. The Court held in *Pell* and *Saxbe* that the government had no obligation thus to provide information. However, by preventing any sort of meaningful access to the jail, the Sheriff in this case is not only refusing to provide information to the press but is actually preventing the press from seeking information to which the public is entitled. The Sheriff does not deny that the Alameda County residents who elected him are

entitled to know about incidents and conditions in Santa Rita. The ground for his policy rather is that he cannot admit the public as a whole to inquire about such incidents and conditions and therefore he need not admit the proxy press. That is a mistaken ground. This Court has never upheld governmental interference with press access to governmental facilities or information solely on the basis that public access is administratively inconvenient. Mere inconvenience or the impracticability of allowing scores or hundreds of individuals to have access to facilities or information cannot justify excluding the press as proxy for them.

It is a different matter where there is some good reason for barring the public from acquiring information either on its own or through its proxy the press. The "big wheel" phenomenon was thought to be such a reason in *Pell* and *Saxbe*, though the aftermath of those cases should caution the Court to be skeptical of the claims of jail or prison administrators as to what the administration of their institutions demands. In both the federal prison system and in the California system, the interviews with designated inmates that were forbidden in those cases are now allowed.[6] In any event, where the content of the information (or the nature of its source) does not demand secrecy but there are administrative reasons for denying access to the public as a whole, then the press should have access. "The journalist can disseminate information with minimal disruption to those controlling it." Comment, *The Right of the Press to Gather Information*

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[6] Federal Bureau of Prisons, Policy Statement No. 1220.1C (1977); California Department of Corrections, Administrative Manual §§ 415.01 - 415.42 (1975).

After Branzburg and Pell, 124 U. Pa. L. Rev. 166, 182 (1975). In short, while the government need not put information that the press desires on a silver platter, neither can the government prevent the press from searching for information to which the public is entitled, merely because administrative reasons make it impracticable for individual members of the public to gain access to that information.

IV. EQUAL ACCESS FOR EACH OF THE VARIOUS MEDIA OF COMMUNICATIONS IS REQUIRED BY THE EQUAL PROTECTION CLAUSE

By forbidding cameras and tape recorders on his periodic tours, the petitioner Sheriff discriminates against radio and television stations. Cameras and tape recorders are the essential and recognized tools of radio and television news-gathering. That discriminatory aspect of the Sheriff's policy is alone enough to condemn it as a denial to radio and television of the equal protection of the laws. The District Court's preliminary injunction affirmed by the Court of Appeals properly encompassed the respondent KQED (operator of both a radio and a television station) and all "responsible representatives of the news media" of all types. It ordered the Sheriff not to exclude "KQED and responsible representatives of the news media" from Santa Rita as a matter of general policy and not to prevent them "from providing full and accurate coverage of the conditions prevailing therein." (Pet. App. 27.) The order is no less broad than the First Amendment and the equal protection clause require. The guarantees of the First Amendment apply equally to – among others – pamphleteers, *Cantwell v. Connecticut,* 310 U.S. 296 (1940); newspapers, *Miami Herald Publishing Co. v. Tornillo,* 418

U.S. 241 (1974); and radio and television, *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee,* 412 U.S. 94 (1973).

Radio and television, as a part of the press, perform their First Amendment functions in an important and unique way. Television in particular brings matters home to the public as probably no other medium of communication can. The jail system, to a large extent hidden from public scrutiny, can be portrayed on television in more forceful terms than it can be on the printed page. Consequently, television coverage of perhaps shocking events and conditions may create a greater impact on the public. The educational benefits afforded by the electronic media also enable audiences without adequate reading skills to receive information about their jails and to form opinions thereon.

Sheriff Houchins has offered no sufficient justification for banning cameras and tape recorders. There is no suggestion in the record that cameras and tape recorders would pose any threat, much less a clear and present danger, to security at Santa Rita. In the circumstances there cannot be a compelling State interest in prohibiting them; only such an interest could possibly justify a discriminatory denial of a fundamental First Amendment freedom. To be sure, this Court held in *Estes v. Texas,* 381 U.S. 532 (1965), that allowing television cameras in a courtroom deprived a defendant of a fair trial. However, the issue here is altogether different, and a courtroom is not a jail. Furthermore, the technological advances that have resulted in making possible far less intrusive television camera coverage than was possible in 1965 cast doubt on the vitality of the *Estes* decision.

Fulfillment of the First Amendment role of the press in gathering and reporting news often depends upon the different perspectives afforded by different media. There is no room for the arbitrary restrictions on the electronic media that Sheriff Houchins has imposed. A jail that is open to some reporters (however inadequate the opening) must be open to all in the absence of a compelling justification. Compare *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976). As the court said in *Lewis v. Baxley*, 368 F. Supp. 768, 779 (M.D. Ala. 1973):

> "In this case, the state is asserting the right to exclude certain members of the press from public sessions of the legislature, and from press conferences and press rooms from which other members of the press are not excluded. In this instance, the state must assert a compelling governmental interest and a substantial nexus between that interest and the action taken in furtherance thereof."

No such interest or nexus has been asserted here as would justify the Sheriff's disparate treatment of the print press and the electronic press.

CONCLUSION

The judgment below should be affirmed.

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